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IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D19-1362
Lower Case No. 19-06869 CA (15)

JAMES ERIC MCDONOUGH,

Appellant,

v.

CITY OF HOMESTEAD,

Appellee.

ANSWER BRIEF OF CITY OF HOMESTEAD

ON APPEAL FROM A FINAL ORDER ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

Appellant, James Eric McDonough, shall be referred to as "Mr. McDonough"

Appellee, City of Homestead, will be referred to as "City"

References to Appellant's initial brief will appear as "IB" followed by the page number.

References to the record on appeal will appear as "R. __."

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

This appeal arises from the trial court's entry of a Final Judgment Denying Mandamus Relief on April 17, 2019 ("Final Order"). R. 506-08. The lawsuit arose from a public records request submitted to the City by appellant, James Eric McDonough, pursuant to Chapter 119, Florida Statutes (the "Public Records Request"). Mr. McDonough then petitioned the trial court for mandamus relief to compel the City to produce records responsive to the Public Records Request. R. 9-20.

Following the trial court's entry of an alternative writ in mandamus (R. 58), the City filed its answer, together with affidavits. R. 370-466. Without a hearing, the trial court then entered its Final Order, which stated that "[b]ecause no factual dispute exists regarding whether the City produced the non-exempt workers' compensation leave records, the Court finds an evidentiary hearing unnecessary."[1]

Here, Mr. McDonough asserts (IB at 7-9) that in entering its Final Order without a hearing, the trial court overlooked section 119.11(1), Florida Statutes, which states that "[w]henever an action is filed to enforce the provisions of [Chapter 119], the court ***shall*** set an immediate hearing …." § 119.11(1), Fla. Stat. (emphasis added).

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[1] In its answer, the City did not contest or object to Mr. McDonough's request for a hearing. Instead, the City asserted (and continues to assert) that, ultimately, Mr. McDonough is not entitled to mandamus relief or costs.

B. Statement of the Facts.

On Friday, March 8, 2019, Appellant served his initial petition for writ of mandamus on the City. R. 9-20. On March 11, 2019, Mr. McDonough filed a motion for immediate hearing. R. 21-22. The next day, on March 12, 2019, Appellant filed his amended petition for writ of mandamus. R. 23-57. On March 13, 2019, the trial court entered its Alternative Writ in Mandamus. R. 58.

On April 2, 2019, the City filed its Answer and Affirmative Defenses to the First Amended Petition for Writ of Mandamus and Memorandum in Response to the Alternative Writ in Mandamus (the "Answer"). R. 370-80. In its Answer, the City denied that mandamus relief was available to Mr. McDonough because the City had produced to Plaintiff all non-exempt non-confidential records responsive to the Public Records Request and also asserted that, because the records responsive to McDonough's Public Records Request contained confidential and exempt information, the production of such records is not ministerial, thus further precluding mandamus relief. *Id*. The City did not, however, assert that Mr. McDonough was not entitled to a hearing. *Id*.

On April 17, 2019, without having held a hearing pursuant to section 119.11, Florida Statutes, the trial court entered the Final Order. R. 506-08. Therein, the trial court concluded that "[b]ecause no factual dispute exists regarding whether the City produced the non-exempt workers' compensation leave records, the Court finds an evidentiary hearing unnecessary." R. 507.

On April 25, 2019, Mr. McDonough filed a Motion for Rehearing or to Vacate the Final Order. R. 476-96. On June 7, 2019, the trial court entered its Order Denying the Motion for Rehearing. R. 509-10. On July 5, 2019, Mr. McDonough filed his Notice of Appeal. R. 497 – 505.

SUMMARY OF ARGUMENT

As an initial matter, the City does not dispute that the entry of the Final Order prior to holding a hearing pursuant to section 119.11(1), Florida Statutes was likely premature.

The City, however, does not agree with the other arguments for reversal asserted by Mr. McDonough. Specifically, while Mr. McDonough asserts that his petition for writ of mandamus should also be considered an action for declaratory relief (IB at 16-17), Florida law is clear that his petition cannot simply be treated as a complaint for declaratory relief. Moreover, Mr. McDonough's assertion that the affidavits filed by the City are purportedly invalid because they were notarized by Julissa Chavez, "the employee who initially responded to the Request," is simply incorrect and is based on an incomplete reading of the applicable statute.

Based on the foregoing, the City does not contest the relief sought by Mr. McDonough to the extent such relief is limited to the remand of this matter to the trial court to conduct a hearing pursuant to section 119.11(1), Florida Statutes.

STANDARD OF REVIEW

"The proper standard utilized in reviewing a trial court's decision on a petition for writ of mandamus is abuse of discretion." *Florida Agency for Health Care Administration v. Zuckerman Spaeder*, LLP, 221 So. 3d 1260, 1263 (Fla. 1st DCA 2017) ("*FAHCA*") (citing *Brown v. State*, 93 So.3d 1194, 1195 (Fla. 4th DCA 2012)). Similarly, "[t]he trial court's denial of a motion for rehearing is reviewed using an abuse of discretion standard." *Almendares v. State*, 979 So. 2d 448, 449 (Fla. 4th DCA 2008) (citing *Brink v. Bank of America, N.A.*, 811 So.2d 751 (Fla. 1st DCA 2002)). However, the trial court's decision whether to grant an evidentiary hearing is subject to de novo review. *Hollis v. Massa*, 211 So. 3d 266, 267 (Fla. 4th DCA 2017) (citing *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)).

Moreover, the trial court's evidentiary findings of fact may not be disturbed if there is competent substantial evidence in the record to support them. *Ferk Family, LP v. Frank*, 240 So. 3d 826, 835 (Fla. 3d DCA 2018); *Pages v. Seliman-Tapia*, 134 So. 3d 536, 538 (Fla. 3d DCA 2014); *Verneret v. Foreclosure Advisors, LLC*, 45 So. 3d 889, 891 (Fla. 3d DCA 2010)). The trial court's legal conclusions, as well as its interpretation of existing precedents, are reviewed *de novo*. *Bank of America v. Delgado*, 166 So. 3d 857, 860 (Fla. 3d DCA 2015); *Pages*, 134 So. 3d at 538 (citing *Darling v. State*, 81 So. 3d 574, 577 (Fla. 3d DCA 2012).

ARGUMENT

I. THE CITY DOES NOT DISPUTE THAT THE ENTRY OF THE FINAL ORDER PRIOR TO HOLDING A HEARING PURSUANT TO SECTION 119.11, FLORIDA STATUTES, WAS PREMATURE.

Generally, in consideration of a petition for writ of mandamus, it is within the trial court's discretion to decide whether there is "a contested issue requiring an evidentiary hearing." *Major v. Hallandale Beach Police Dept.*, 219 So. 3d 856, 858 (Fla. 4th DCA 2017) (affirming the denial of a petition for writ of mandamus without a hearing and citing *Hollis v. Massa*, 211 So. 3d 266, 268 (Fla. 4th DCA 2017)).

Mr. McDonough asserts, however, in his initial brief (IB at 7-9) that in entering the Final Order without a hearing, the trial court overlooked section 119.11(1), Florida Statutes, which states that "[w]henever an action is filed to enforce the provisions of [Chapter 119], the court ***shall*** set an immediate hearing …." § 119.11(1), Fla. Stat. (emphasis added).

While the City believes that the trial court reached the right result in its denial of mandamus relief, such a determination prior to holding a hearing pursuant to section 119.11(1), Florida Statutes was likely premature.[2] *See*, *e.g.*, *Kline v. University of Florida*, 200 So. 3d 271, 272 (Fla. 1st DCA 2016) (holding that "[t]he plain language of section 119.11(1) requires the trial court to conduct a

[2] For this reason, on September 23, 2019, the City filed a motion to relinquish jurisdiction in an effort to allow the trial court to hold a hearing pursuant to section 119.11(1), Florida Statutes. However, on September 24, 2019, this Court entered its order denying the City's motion.

hearing on actions seeking to enforce the right to access public records under chapter 119. Absent waiver, an order issued without the statutorily-required hearing is premature."); *Grace v. Jenne*, 855 So. 2d 262, 263 (Fla. 4th DCA 2003) (reversing order dismissing Chapter 119 complaint and holding that "[a]lthough the sheriff may ultimately not be able to retrieve these records, because of their age or another reason, the order in this case, entered without an evidentiary hearing, was premature.").

Based on the foregoing, the City does not contest the relief sought by Mr. McDonough to the extent such relief is limited to the remand of this matter to the trial court to conduct a hearing pursuant to section 119.11(1), Florida Statutes.

II. THE REMAINING ARGUMENTS ASSERTED BY MR. MCDONOUGH ARE WITHOUT MERIT.

A. Mr. McDonough's petition for writ of mandamus cannot be considered an action for declaratory relief.

While Mr. McDonough asserts that his petition for writ of mandamus should also be considered an action for declaratory relief (IB at 16-17), Florida law is clear that his petition cannot simply be treated as a complaint for declaratory relief. *See White v. McNeil*, 989 So. 2d 727, 728 (Fla. 1st DCA 2008) (finding that trial court correctly denied plaintiff's request to treat his mandamus petition as a declaratory action because "[s]uch a claim must be properly pleaded and the defendant or defendants served in accordance with the Florida Rules of Civil Procedure.").

B. The affidavits filed by the City are valid.

Moreover, Mr. McDonough's assertion that the affidavits filed by the City are purportedly invalid because they were notarized by Julissa Chavez, "the employee who initially responded to the Request" (IB at 12-13) is simply incorrect and is based on an incomplete reading of the applicable statute. Section 117.107(12), Florida Statutes provides that:

> [a] notary public may not notarize a signature on a document if the notary public has a financial interest in or is a party to the underlying transaction; however, *a notary public who is an employee may notarize a signature for his or her employer, and this employment does not constitute a financial interest in the transaction nor make the notary a party to the transaction under this subsection as long as he or she does not receive a benefit other than his or her salary and the fee for services as a notary public authorized by law.*

§117.107(12), Fla. Stat. (emphasis added). Because Ms. Chavez notarized the affidavits as part of her employment with the City and received no financial benefit other than her salary, no violation of section 117.107(12) occurred. Therefore, the affidavits are valid.

CONCLUSION

Based on the foregoing, the City does not contest the relief sought by Mr. McDonough to the extent such relief is limited to the remand of this matter to the trial court to conduct a hearing pursuant to section 119.11(1), Florida Statutes.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Matthew H. Mandel*
Matthew H. Mandel

CERTIFICATE OF SERVICE

I certify that a copy of this notice was served via E-Mail, and by U.S. Mail on November 4, 2019, on James Eric McDonough, *pro se,* 32320 SW 199th Ave, Homestead, FL 33030, Email: Phd2b05@gmail.com.

/s/ *Matthew H. Mandel*
Matthew H. Mandel